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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 304

PAPER CONTAINER MFG. COMPANY,
Petitioner,

v.

DIXIE CUP COMPANY,
Respondent.

PETITION OF PAPER CONTAINER MFG. COMPANY FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

FRANKLIN M. WARDEN,
JAMES C. LEATON,
38 S. Dearborn St.,
Chicago 3, Illinois,

CASPER W. OOMS,
209 S. La Salle St.,
Chicago 4, Illinois,
Attorneys for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the United States:

Your Petitioner, Paper Container Manufacturing Company, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment entered by that Court on June 10, 1949 (R. 93) affirming the judgment of the District Court denying to Petitioner any award of master's fees, attorney's fees, court reporter's charges, and costs (approaching in total $200,000) incurred by the Petitioner in patent infringement litigation instituted by the Respondent (Rec. 67 to 69).

A Short Statement of the Case.

This suit began on February 11, 1939 (1 P. R. 2)* when complaint alleging infringement of eleven patents was filed by Respondent. Three more patents were thereafter added by amendment (1 P. R. 85). Answer was filed as to each of the fourteen patents and the seventy claims specified as infringed. Before trial, charges were voluntarily dropped as to all but four patents and twenty-six claims.

The four remaining patents were held valid and infringed on March 14, 1942 (2 P. R. 760). Among these patents was Smith and Bild patent 2,203,510, covering a paper cup making machine, the only patent that survived into the five-year accounting. To secure the decision as to this machine, Respondent had repeatedly stressed the feature of cutting a moving strip of paper completely across to define paper cup blanks, a detailed improvement which alone saved the patent. For example, Respondent's expert stated:

> "Through this we will see that the continuously operating feeding and forming mechanism which, as explained, are all tied together through the gears, advances a strip of paper under a knife which cuts clear across and cuts a strip which the patent explains goes clear across—I mean, makes a cut which the patent explains goes clear across in a line generally transversely and other than straight." (1 P. R. 202).
>
> "Now, this specification explains that in the making of this cup the action of the knife on this tip is to cut completely across the strip. * * *" (1 P. R. 203).

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*The original printed record on Appeal 7972 to the Court of Appeals for the Seventh Circuit is referred to herein by the letters "P. R.", together with the volume and page. This record is before this Court as No. 505, October Term, 1942. The present record is referred to by the letters "Rec."

The District Court sustained this position and gave judgment for the Respondent.

Appeal was taken to the Court of Appeals for the Seventh Circuit (Appeal No. 7972). That Court reversed the District Court as to three of the four patents, and held that only four claims of the Smith and Bild patent were infringed. On the appeal Respondent defined the invention as demanding the feature of cutting off the end of the moving paper strip, stating:

> "In giving the following quite condensed analysis of the inventions of Smith & Bild which are involved in this suit, we have endeavored to refer to the structural features and operations which are involved in the claims of this patent which are in suit.
>
> "The essence of the Smith and Bild patented improvements can properly be described as a machine wherein feeding means continuously feed or advance a strip of paper stock toward a forming element shaped to have a conical cup formed therearound, cutting means acting prior to the start of the forming operation to successively sever blanks from the continuously moving strip **by repeatedly cutting off the leading end of the strip** * * *." (Brief Appeal No. 7972, pp. 50-51) (Emphasis added).

The case was thereafter remanded to the District Court, which referred it to a master for accounting under the single surviving patent. Early in the accounting two additional types of machines were charged with infringement of the Smith and Bild patent (Rec. 24). One type of machine had been in use by Petitioner for a year and a half before the original trial and Respondent had notice of that fact long before trial (Rec. 22, 23). The other additional type of machine consisted of the originally accused machines modified immediately after the finding of infringement to avoid the feature of repeatedly cutting off the end of the strip, the feature which alone

conferred patentability upon the claims, and the feature relied upon by Respondent in the Patent Office, the District Court, and the Court of Appeals to save the patent. It was later determined that neither group of machines infringed the Smith and Bild patent.

Neither of the additional machines employed this feature previously characterized by Respondent as the essence of the Smith and Bild invention. Consequently, Respondent was compelled to, and did, take a position contrary to its previous representations to the Patent Office and to the courts and adopt a new and broader theory of the scope of the patent in order to justify the new charge.

Petitioner promptly filed a petition for a declaration of non-infringement by the additional machines (Rec. 24). The purpose of this petition was to avoid a needless accounting as to non-infringing machines. Respondent replied to this petition by a motion to dismiss stating that there were "proper ways" to determine whether the new machines should be included in the accounting and on the next day filed a motion to punish Petitioner for contempt. In the motion to punish, Respondent asserted that Petitioner could not contest the question of infringement (Rec. 24, 88-89).

The matters of the petition and motion came before the District Court on April 21, 1943. He referred the entire matter to the master.

On November 27, 1944, the master filed a draft report. In this report he recommended an injunction and an order of accounting with respect to the additional machines. However, he did not propose to proceed with an accounting as to these machines until the matter of infringement was settled by the District Court.

On October 9, 1944, Respondent filed suggestions regarding the master's draft report, objecting to a determination of the infringement issue before proceeding with the accounting. In the objections Respondent stated:

> "• • • We suggest that the Master should not await the entry of any order by the court but should proceed, in accordance with the findings in his report, to order the defendant to prepare and state an account consistent with the views expressed by the Master and that the entry of said order should not be conditioned upon further action by the court. • • •" (para. 3).

On January 15, 1945, the date set for argument on the draft report, the District Court refused to hear arguments and, following Respondent's suggestion, referred the case back to the master for further evidence on all issues.

Petitioner promptly commenced work on the accounting statement covering the additional machines and on April 23, 1945, submitted it to the master (Rec. 25). There followed a prolonged dispute concerning the authenticity of the statement and repeated demands by Respondent for further itemization. Finally, Petitioner was forced to list individual orders and purchases by name of customer or supplier, date, type of cups, number of cups, and price paid. Auditor's fees paid by Petitioner for preparation of the bulky volumes containing this information totalled $9,634.70 (Rec. 63, 10).

The additional accounting breakdowns furnished by the Petitioner were never used. They did not affect the ultimate accounting award which was made on the basis of reasonable royalties rather than profits.

The District Court entered a judgment in favor of Respondent on January 20, 1948. This judgment con-

firmed the master's finding that the additional machines infringed Smith and Bild. The judgment carried an award in the amount of $2,184,380.24. (The interest and accumulating liability was further accruing at the rate of $20,000 a month). The judgment was arrived at by trebling the actual damages computed on the basis of Petitioner's net sales of paper cups and adding the master's fees, court reporter charges, and Respondent's attorney fees, the latter amount alone exceeding $71,000 (169 F. (2d) 645 *et seq.*) Most of this liability arose from respondent's new construction of its patent.

On appeal from the accounting decision, the Court of Appeals held that the Smith and Bild patent could not be construed as Respondent newly contended to cover the new machines but had to be limited as Respondent had limited it in the Patent Office. The court accordingly found no infringement by these machines (169 F. (2d) 645). This decision rendered fruitless the 5 year period of litigation subsequent to Petitioner's petition for a judgment of non-infringement over five years earlier and vindicated Petitioner's original contentions.

The Court of Appeals decision reduced the accounting award by over two million dollars, leaving only the sum of $154,027.17 this being the award for infringement by the machines initially involved in the suit, machines discontinued in use in 1942 (Rec. 19). The Court specifically left open the question of what, if any, master's fees, attorney's fees, court reporter's charges, and costs should be allowed either party.

The prolonged accounting progressively reduced Petitioner's resources. Petitioner's expenses included $1,512.90 court reporter's charges, $9,634.70 auditor's expenses, $152,274.59 attorney's fees, and $12,500 master's fees (half of the total of $25,000). By the time the Dis-

trict Court handed down its two million dollar judgment of infringement, it was impossible for Petitioner to raise the money necessary to print the 5,000 page record or to file the requisite supersedeas bond. Only the generosity of the Court of Appeals in waiving these requirements made appeal possible.

After the second appeal, the case was again remanded to the District Court. Petitioner then sought recovery of ninety per cent of its master's fees, court reporter's charges, attorney's fees, totalling $166,287.49 and costs. This percentage approximated the portion of the expenses definitely attributable to the change in Respondent's interpretation of its patent to cover the two additional types of machines. It also approximated the percentage by which the Court of Appeals reduced the District Court judgment. The District Court denied this request, possibly to achieve consistency with its second reference of the case to the master as to the additional machines. The Court of Appeals affirmed. No costs were awarded either party and Petitioner was thus forced to assume the burden of a five-year accounting contest over infringements that had never occurred, and the preceding five-year litigation instituted under fourteen patents with only one surviving.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 1254 (1), Title 28, United States Code.

The judgment of the Court of Appeals was entered June 10, 1949 (Rec. 93).

Opinion Below.

The opinion of the Court of Appeals appears in the Record at pages 88 to 92, inclusive, reported at 174 F. (2d) 834.

The District Court entered judgment without opinion (Rec. 67-69).

Other opinions in the litigation appear under the title of this case at 130 F. (2d) 569 and 169 F. (2d) 645.

Questions Presented.

1. May a Court, without abusing its discretion, permit a patent owner to file on fourteen patents, conduct a five-year litigation on four of them with only one surviving, and then conduct a further five-year accounting, nine-tenths devoted to non-infringing machines, after all infringement had ceased and then deny the harassed defendant all costs, attorneys' fees, master's fees, etc. incurred in the futile proceedings?

2. May a Court, without abusing its discretion, deny to the defendant in a patent infringement action the master's fees, attorneys' fees, court reporter's charges and costs associated with a ten-year patent infringement litigation wherein:

a. Infringement was charged and answer made as to fourteen patents and over 70 claims, but the charges were withdrawn as to all but four patents and on appeal only four claims of one patent were held infringed;

b. When the matter was referred to the master for accounting, the patentee promptly claimed that machines not previously involved in the litigation infringed the single patent left in the case;

c. The additional machines brought into the case by the charge made in the accounting were in use by the defendant prior to the original trial of the cause and the plaintiff knew of such use;

d. Plaintiff, in order to obtain the patent from the Patent Office and to prevail at the trial and on the subsequent appeal, had made representations to the Patent Office and the courts inconsistent with its subsequent charge of infringement first made before the master as to the additional machines;

e. Plaintiff insisted upon an accounting as to the additional machines before an adjudication of infringement;

f. The charge of infringement as to the additional machines was clearly barred by a file wrapper estoppel, as the Court of Appeals subsequently held (169 F. (2d) 645, 648, C. A. 7, 1948);

g. Plaintiff unduly prolonged the accounting and caused excessive expenses to defendant by refusing to accept defendant's accounting statements and demanding an impractical and unrealistic invoice-by-invoice breakdown of many thousand sales and purchases, resulting in voluminous detailed schedules that were never thereafter used and did not in any way influence the outcome of the litigation except to increase the expenses of the defendant?

3. Where in a patent infringement accounting, the defendant supplies an accounting statement giving the net sales and other figures ultimately used to determine liability and the patentee insists upon detailed schedules

of sales and purchases itemized by individual transactions and the detailed schedules do not affect the ultimate liability and are not thereafter used by the plaintiff, did the trial court abuse its discretion in refusing to award to the accused infringer the amount of its out-of-pocket expenses occasioned by the unnecessary schedules?

Reasons Relied on for Allowance of the Writ.

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following grounds:

1. The decision of the Court of Appeals denying any award of the master's fees, attorney's fees, court reporter's charges, or costs occasioned by Respondent's abuse of Letters Patent, encourages and promotes like abuse of Letters Patent by permitting patentees to bring unjustified patent infringement proceedings for the purpose of harassing competitors and neutralizing their competition by process of attrition, without risk of a money judgment for the damages inevitably inflicted by these acts.

2. Section 4921 R.S. (as amended August 1, 1946) displays a clear public policy that the owner of a patent may not use the patent as an instrument of oppression and that attorney's fees and other expenses so incurred should be awarded to the prevailing party in a patent infringement action brought and conducted with the object and purpose of oppression. The decision of the Court of Appeals contravenes this public policy.

3. The question presented by this petition is an important question, not previously passed upon by this Court, in relation to the Constitutional purpose of the patent grant in promoting "the progress of science and

useful arts" (U.S. Constitution, Art. 1, Sec. 8). The decision of the Court of Appeals encourages patentees to prostitute Letters Patent to a purpose foreign to and inconsistent with the Constitutional objective.

4. "• • • The possession and assertion of patent rights are 'issues of great moment to the public.' (citing cases) A patent by its very nature is affected with a public interest. • • • The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope. • • •" *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.*, 324 U. S. 806, 815 (1944).

Wherefore, your Petitioner prays that this petition be granted and that a writ of certiorari be issued to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

FRANKLIN M. WARDEN,
JAMES C. LEATON,
CASPER W. OOMS,
Attorneys for Petitioner.

Chicago, August 26, 1949.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No.

PAPER CONTAINER MFG. COMPANY,
Petitioner,

v.

DIXIE CUP COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

United States Letters Patent Is a Privilege Conditioned By a Public Purpose—That Purpose Is Defeated When a Patent Is Used as an Instrument of Oppression, to Neutralize Competition, or as an Instrument of Judicial Harassment.

The sovereign grant of a patent monopoly necessarily invests the patentee with a commercial weapon of incalculable economic potency. The grant must carry with this power the obligation to exercise it with due regard to the public trust implied, with recognition of its clear limitations, and with the resultant caution that the possession of this power demands.

In the series of patent misuse decisions commencing with *Motion Picture Patents Co.* v. *Universal Film Manufacturing Co.*, 243 U. S. 502 (1917) and extending through *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661 (1944), this Court has confined the monopoly of United States Letters Patent to the precise scope of the claim language. This Court has aptly observed that:

> "The grant of a patent is the grant of a special privilege 'to promote the Progress of Science, and useful Arts.' Const., Art. 1, § 8. It carries, of course, a right to be free from competition in the practice of the invention. But the limits of the patent are narrowly and strictly confined to the precise terms of the grant. (citing cases). It is the public interest which is dominant in the patent system. (citing cases). It is the protection of the public in a system of free enterprise which alike nullifies a patent where any part of it is invalid (citing cases) and denies to the patentee after issuance the power to use it in such a way as to acquire a monopoly which is not plainly within the terms of the grant. • • • The patent is a privilege. But it is a privilege which is conditioned by a public purpose.•••" (*Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U.S. 661 at p. 665, 1944).

In the patent misuse decisions, this Court has denied relief to a patentee who attempts to expand his patent rights to effect a monopoly over subject matter not within the scope of the grant. Even relief for direct infringement of the patent has been denied because:

> "• • • Where the patent is used as a means of restraining competition with the patentee's sale of an unpatented product, the successful prosecution of an infringement suit even against one who is not a competitor in such sale is a powerful aid to the maintenance of the attempted monopoly of the unpatented article, and is thus a contributing factor

in thwarting the public policy underlying the grant of patent. * * *" *Morton Salt Co.* v. *Suppiger*, 314 U.S. 488, 493 (1942).

This Court has exhibited like concern for the public interest inherent in patent litigation by insisting that Letters Patent spring from backgrounds free from fraud and that their enforcement not be tainted by fraud. *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.*, 324 U. S. 806 (1944); *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240 (1933).

However, in no case has this Court passed upon or stated the like principle that must be applied to misuse of Letters Patent by abuse of the judicial process involved in the indiscreet and malevolent assertion of patent rights.

The impact of the condemned restraints is rarely as direct or the incidence of suppression of competition as extensive as the results that attend indiscriminate assertion of patent rights in baseless litigation or in the burdens that can be inflicted by a patentee upon an adjudicated infringer in the guise of an accounting proceeding.

The record of the present case vividly displays an effort to use Letters Patent to accomplish a monopoly not intended by the grant. This effort was no less prejudicial to the public interest than the efforts this Court has condemned. Only in the manner of impact of the asserted patent right does this case differ from the prior decisions. Herein lies the need for a decision by this Court. The public interest is no less prejudiced because the means adopted by the Respondent differ from the means heretofore passed upon.

Respondent's technique of neutralizing competition by oppressive patent infringement litigation is not novel.

One student of the patent system, reviewing the practices of the Hartford-Empire Company, declared:

> "Next a blitzkrieg was directed against the independents. They were harassed with suits for infringement, which kept them occupied, drained their resources, disorganized their markets. In the end they had to capitulate and accept the settlement dictated by the alliance. Their patents—not yet invalidated by litigation—were taken over by Hartford. • • • In instances, the threat of a bout at law was enough; in others, independents or their customers had to have their days in court before they were willing to capitulate." (Hamilton, T.N.E.C. Monograph No. 31, p. 111).

See also the opinion of Judge Kloeb in *U. S.* v. *Hartford-Empire Co.*, 46 F. Supp. 541, 565 (1942).

The present case displays clearly the adverse effect on competition incident to misuse of the judicial process in connection with a patent infringement suit. A decade ago, when this litigation commenced, Petitioner was an infant organization starting in business and Respondent was a mature, well-established organization with substantial resources. Petitioner was met by a formidable patent infringement charge and was forced to withstand the expense of marshalling defenses as to fourteen patents, only to have Respondent later withdraw as to all but four.

When the scope of the patent was finally defined in the first Court of Appeals decision, Respondent changed its tactics and insisted on a new patent infringement charge. The tactical device of bringing the charge initially in the accounting, although Respondent knew of the newly accused machines before the first trial, together with subsequent legal maneuvering, ultimately forced Petitioner to go through a complete accounting before its

defense of no infringement—a defense clearly available in view of the Patent Office proceedings and Respondent's own definition there and in court of the asserted invention—was vindicated. During the course of this five-year accounting, demands by the Respondent for unnecessary material further exhausted the resources of the struggling Petitioner.

When the District Court entered its final erroneous judgment for over two million dollars, Petitioner was financially prostrate. The decade of litigation for the right to compete as to subject matter in the public domain seemed futile. Only because the Court of Appeals waived the usual formalities was it possible to appeal that erroneous decision and secure the right to compete.

How do the rules as to patentability and infringement protect the public interest when the judicial process can be abused to preclude the accused infringer from raising these issues before its resources are exhausted?

The Public Policy Is Clear That Accounting Proceedings Must Follow, Not Precede, Patent Infringement Decisions.

The patent infringement statute under which this suit was brought specifically recites that an accounting of profits should follow, not precede, a finding of infringement. This is evident from the following language:

> "The several courts * * * shall have power to grant injunctions according to the course and principles of courts of equity * * * and upon a decree being rendered in any such case for an infringement the complainant shall be entitled to recover * * * profits to be accounted for by the defendant. * * *" (Sec. 4921 R. S., 35 U. S. C. 70, prior to 1946 amendment.)

This statutory language leaves no room for doubt—accounting is to *follow*, not precede, determination of validity and infringement.

In *Cover* v. *Chicago Eye Shield Co.*, 136 F. (2d) 374, 375 (C.A. 7, 1943) the court declared:

> "For many years it has been the custom or rule of all district courts in the trial of patent cases to first have a separate hearing on the question of validity and infringement and never to go into a question of accounting until the questions of validity and infringement have been determined. This has been the practice in which the patent bar generally has willingly acquiesced and approved. In most cases the accounting is a laborious and very expensive procedure. Of course, in the absence of validity and infringement, there could never be any use for an accounting. We think this view has been generally accepted by the patent bar and all federal courts.
>
> "Appellant, however, urges that a contrary practice would produce better results, and his main contention is that the law permits only one trial of all the issues raised in a suit and this cannot be divided into more than one trial. Such procedure might perhaps be of more benefit to one who charges infringement, but it seems to us that it would place the defendant at a decided disadvantage. * * *"

In the present case the procedure followed was contrary to the statute and to the decisions. It imposed upon Respondent the heavy financial burdens here sought to be recovered. It was almost successful in giving to Respondent a monopoly not covered by its patent. Common justice and the public interest dictate that the Respondent be held responsible for these expenses.

Unfortunately the immeasurable damage inflicted upon a business during the years of litigation, the deprivation of officers' time and energies, etc., must remain incom-

pensable. To the extent that the injustice can be remedied, the most elementary principles of equity dictate that every available device to rectify the wrong be exercised to minimize the injury inflicted in a groundless patent suit.

The Public Interest Can Be Vindicated Only By Restoring to Petitioner the Expenses Forced Upon It By the Wrongful Acts of Respondent.

In the patent misuse cases denial of equitable relief has formed a convenient device, long familiar to courts of equity, to penalize misconduct of patentees. Here that denial is not enough, for it was the fact of the litigation, not its outcome, that was intended to (and almost did) accomplish the ends sought.

In the present case Petitioner, by a narrow margin, has prevailed in its fight to compete. Had Respondent been successful in exhausting Petitioner's resources before the last appeal, there would never be a determination of the proper scope of Respondent's patent and no opportunity to reach this Court for redress.

We can not know how many business organizations have been eliminated from the competitive struggle or deprived of the vigor necessary to compete against established enterprises by assertion of invalid or non-infringed patents against them. We do know that the practice has been followed. The public interest demands that it, like other abuses of the patent monopoly, be stamped out, a step that can only be taken by forcing upon errant patentees the damages that their misdeeds occasion.

Congress has recognized the necessity of giving monetary relief to the victim of an unjustified patent suit, for the law now declares that:

> "• • • the court may in its discretion award reasonable attorney's fees to the prevailing party upon the entry of judgment on any patent case." (Section 4921, R. S., 35 U. S. C. 70, as amended August 1, 1946).

The Court of Appeals in the present case considered itself limited by the discretion vested in the District Court. Its emphasis on that discretion was so great that it failed to perceive that the abuse here is so wanton and contrary to the public interest that the exercise of judicial discretion in the light of public interest can lead to but one result, namely, an award to Petitioner of its expenses.

This is not a case where a patentee simply erred in evaluating the scope of its patent. This is not a case where the *prima facie* validity of the grant justified the assertion made by Respondent. Here the patent was given two interpretations, one for purposes of initial decision and the other for purposes of the accounting. Final decision as to the latter was successfully postponed for five years while Petitioner's resources were drained. The purpose displayed is similar to that of the patent misuse cases. Here, as there, the practice should be struck down and the public interest vindicated.

Petitioner submits that where, as here, the record displays a manifest abuse of Letters Patent and the judicial process in an effort to neutralize a competitor by sheer financial strength, judicial discretion can be exercised only in a manner to protect the public interest.

CONCLUSION.

The present petition presents a question of public importance not heretofore passed upon by this Court. The decisions below prejudice the public interest touching this question by encouraging its disregard by litigants.

Petitioner prays that the petition for writ of certiorari be granted and that the decree of the Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

FRANKLIN M. WARDEN,
JAMES C. LEATON,
CASPER W. OOMS,
Attorneys for Defendant.

August 26, 1949.